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# Supreme Court of the United States

October Term, 1971

**No. 71-388**

HALCON INTERNATIONAL, INC.,

*Petitioner,*

*against*

MONSANTO AUSTRALIA LIMITED,

*Respondent.*

## PETITIONER'S REPLY MEMORANDUM

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IN THE

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## PETITIONER'S REPLY MEMORANDUM

1. Respondent suggests that this Court has already been presented with, and decided, the question presented by our Petition through its denial of certiorari in *A/S J. Ludwig Mowinckels Rederi* v. *Dow Chemical Co.*, 25 N.Y. 2d 576, *cert. denied,* 398 U.S. 939 (1970). That is not the fact.

The only question presented for review in *Dow Chemical* was whether federal or New York law governed an action in a New York court to restrain arbitration under a maritime contract where the claims sought to be arbitrated

were allegedly barred by the statute of limitations. Under New York law, the running of the statute of limitations on the claims under the main agreement was a valid defense to enforcement of the arbitration agreement. Under federal law, the running of the statute on the claims sought to be arbitrated *under the main agreement* was not a defense to enforcement of the *arbitration agreement.* No equitable defense of laches or estoppel was presented.* This Court was asked to pass only upon the correctness of the decision of the New York court that federal law applied. Certiorari was denied. The *Dow Chemical* case is thus wholly without significance here.

Respondent's citation of *Sears Roebuck & Co.* v. *Glenwal Co.,* 442 F.2d 1350 (2d Cir. 1971), *aff'd,* 325 F. Supp. 86 (S.D.N.Y. 1970) and *Ocean Industries, Inc.* v. *Soros Associates,* 328 F. Supp. 944 (S.D.N.Y. 1971), is puzzling since neither involved a defense of laches or estoppel, nor casts any light whatsoever on the issue here.

The fact remains that aside from the 2-to-1 decision in *Trafalgar Shipping Co.* v. *International Milling Co.,* 401 F.2d 568 (2d Cir. 1968)—and now the 2-to-1 decision in this case—no case has ever construed the Federal Arbitration Act to bar a federal court from considering whether laches in the invocation of the arbitration clause bars its enforcement. As our Petition points out, such a conclusion is inconsistent with *Prima Paint Corp.* v. *Flood & Conklin*

* The federal courts have long recognized a distinction between a defense that the statute of limitations barred claims under the main agreement, and a defense that laches in the invocation of the arbitration clause barred enforcement of the arbitration agreement. *Reconstruction Finance Corp.* v. *Harrisons & Crosfield,* 204 F.2d 366, 369-70 (2d Cir. 1953), *cert. denied,* 348 U.S. 819 (1953).

*Mfg. Co.*, 388 U.S. 395 (1967), and the legislative history of the Act (Petition, pp. 7-11).

2. Respondent also incorrectly states that in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964), this Court held that in cases involving labor arbitration contracts the issue of laches was for the arbitrator, not the court (Brief in Opposition, p. 8). *Wiley* involved no such issue. The issue presented there was:

> "whether the courts or the arbitrator is the appropriate body to decide whether procedural prerequisites which, *under the bargaining agreement*, conditioned the duty to arbitrate have been met." 376 U.S. at 544. (Emphasis supplied.)

Similarly, the list of cases cited by respondent at page 9 of the brief in opposition* did not decide the question of whether laches was for the court or the arbitrator. Like *Wiley*, they involved assertions that there was a failure to comply with steps in the grievance procedure set out in the collective bargaining agreement. Each case thus involved interpretation of the collective bargaining agreement. The defenses of laches and estoppel exist wholly independent of procedures provided in the agreement and rest on principles of equity.

Both the Sixth Circuit decision in *Amalgamated Clothing Workers* v. *Ironall Factories Co.*, 386 F.2d 586, 591-2 (6th Cir. 1967) and the Seventh Circuit decision in *Inter-*

* *Chambers* v. *Beaunit Corp.*, 404 F.2d 128 (6th Cir. 1968); *Local Union* v. *Illinois Power Co.*, 357 F.2d 916 (7th Cir. 1966); *Rochester Telephone Co.* v. *Communications Workers*, 340 F.2d 237 (2d Cir. 1965); *Porter Co.* v. *Local 37*, 400 F.2d 691 (4th Cir. 1968); *Local 148* v. *Interco, Inc.*, 415 F.2d 1208 (8th Cir. 1969); *Bealmer* v. *Texaco Inc.*, 427 F.2d 885 (9th Cir. 1970).

*national Union of Operating Engineers* v. *Flair Builders, Inc.*, 440 F.2d 557, 460 (7th Cir. 1971), specifically distinguished the *Wiley* line of cases on this ground. We have already explained at length why the decision below cannot be squared with *Ironall* or *Flair* (Petition, pp. 12-15). Respondent's citation of the *Wiley* line of cases is no answer.

We do, however, wish to call the Court's attention to a decision of the Fourth Circuit reported only recently, and after we had submitted our Petition. In *Tobacco Workers* v. *Lorillard Corp.*, C.C.H. Lab. Cas. ¶12,058 (4th Cir. Sept. 16, 1971), the Fourth Circuit did indeed create a conflict between itself and the Sixth and Seventh Circuits on the issue of whether, in an action to enforce a labor arbitration contract, laches is for the court or the arbitrator. Specifically acknowledging that the Sixth and Seventh Circuit decisions in *Flair* and *Ironall* were contra, the Fourth Circuit nevertheless held that in an action to enforce a labor arbitration contract under Section 301 of the Labor-Management Relations Act laches was for the arbitrator, not the court. In its view, the importance of labor arbitration as a means of resolving industrial strife compelled that result.*

The Fourth Circuit's decision in *Tobacco Workers* only underlines the need for Supreme Court review of the questions raised here. There is now an acknowledged conflict among the circuits as to whether the issue of laches is for the court or the arbitrator in an action to enforce a labor

* In support of its decision, the Fourth Circuit cited the Seventh Circuit's decision in the instant case. But the Court did not consider the effect of the "saving clause" of Section 2 of the Federal Arbitration Act in actions to compel commercial arbitration; nor was it called upon to do so. Section 301 of the Labor-Management Relations Act has no comparable provision.

arbitration contract. As already noted, in the area of commercial arbitration contracts that question was decided by the Second and Seventh Circuits by divided courts in which both Chief Judges dissented. Viewed in light of the *Tobacco Workers* decision, the Petition in this case raises even more urgently such important questions as: Whether there should be a single standard applicable to both commercial and labor arbitration contracts on the question of laches? If so, whether that standard should be the one applied in *Flair* and *Ironall,* or the one applied in *Tobacco Workers?* Whether the standard to be applied in labor cases is an appropriate standard in commercial cases? Whether in light of the "saving clause" in section 2 of the Federal Arbitration Act, and the special legislative history of the Federal Arbitration Act, the issue of laches should be for the court in commercial arbitration cases even if, because of the unique importance of arbitration in resolving industrial strife, laches is for the arbitrator in labor arbitration cases?

Accordingly, we believe this case presents an especially appropriate opportunity for the Court to review and resolve the questions raised by the Petition.

Respectfully submitted,

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